FILE COPY

FILED
JAN 5 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 623

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

JOHN DOE et al. (Whose Names Are Otherwise Unknown to Plaintiff); NICHOLAS M. BLASSIE, AUGUST GIESEKE, Individually and as Representatives of LOCAL UNION NO. 88, and LOCAL UNION NO. 88, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the St. Louis Court of Appeals, State of Missouri.

WALTER R. MAYNE,
G. CARROLL STRIBLING,
HAROLD A. THOMAS, JR.,
FORDYCE, MAYNE, HARTMAN, RENARD & STRIBLING,
506 Olive Street,
St. Louis 1, Missouri,
EARL G. SPIKER,
711 14th Street N. W.,
Washington 5, D. C.,
Attorneys for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
Petition for Writ of Certiorari:	
Citations to Opinions Below	2
Jurisdictional Statement	2
Questions Presented	3
Statutes Involved	6
Statement of the Case	7
Reasons for Granting the Writ	12
Conclusion	24
Appendix A:	
Opinion of St. Louis Court of Appeals	25
Appendix B:	
Record entry of St. Louis Court of Appeals denying Petitioner's Motion for Rehearing or, in the Alternative, to Transfer to the Missouri Supreme Court	33
Appendix C:	
Mandate of Supreme Court of Missouri en Banc, denying Petitioner's Application for Transfer from the St. Louis Court of Appeals to the Missouri Supreme Court	34
Appendix D:	
Opinion of trial court, Circuit Court of the City of St. Louis, Missouri	35
Appendix E:	
Opinion of Missouri Supreme Court transferring appeal to St. Louis Court of Appeals on procedural grounds	42
Appendix F:	
Statutes Involved	56

Cases Cited.

Adams Dairy v. Burke (Mo. Sup.), 293 S. W. (2) 281, cert. den. 352 U. S. 969 ..... 16, 22
Algoma Plywood & Veneer Co. v. WERB, 336 U. S. 301 ..... 14, 16, 18
AMC & BW v. Fairlawn, 353 U. S. 20 18
American Hotel Co. v. Bartenders (Mo. Sup.), 297 S. W. (2) 411 4
Bellerive CC v. McVey, 365 Mo. 477, 284 S. W. (2) 492 4
Brinkerhof-Faris T & S Co. v. Hill, 281 U. S. 673 19
Dougherty v. Commonwealth (Va. Sup.), 33 Labor Cases, Para. 71110 22
Drivers Local 639 v. NLRB (C. A. D. C.), 43 LRRM 2156 16
Evans v. I. T. U., 76 F. S. 881 17
Freydberg, Inc., v. I. L. G. W. U., 128 N. Y. S. (2) 470 22
Garner v. Teamsters, 346 U. S. 485 ..... 20, 22
Goodwins, Inc., v. Hagedorn, 303 N. Y. 300, 101 N. E. (2) 697 ..... 16, 22
Guss v. Utah LRB, 353 U. S. 1 ..... 10, 18
Haleston Drug Stores, Inc., v. NLRB, 187 F. (2) 418 .. 17
Hammer v. Textile Workers (N. J.), 111 A. (2) 308 .. 22
International Union v. WERB, 336 U. S. 245 ..... 10, 11, 13, 14, 15, 16, 21, 23
Johnson v. Grand Rapids B & CTC (Mich. Circ. Ct.), 33 Labor Cases, Para. 70996 22
La Crosse Tel. Corp. v. WERB, 336 U. S. 18 13
NLRB v. Electronics Equipment Co., Inc., 194 F. (2) 650 17
NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1 .. 19, 20, 22
NLRB v. Swift & Co., 130 F. S. 214 (affirmed on other grounds, 233 F. [2] 226) 12, 22

Pleasant Valley Packing Co. v. Talarico (N. Y. Ct. of App.), 35 Labor Cases, Para. 71639 22

Quinn v. Buchanan (Mo. Sup.), 298 S. W. (2) 413 4

San Diego BTC v. Garmon, 353 U. S. 26 18
Swift & Co. v. Doe et al. (Mo. Sup.), 311 S. W. (2) 15 .. 25, 27
Swift & Co. v. Doe et al. (Mo. App.), 315 S. W. (2) 465 27

Tallman Co. v. Latal, 365 Mo. 552, 284 S. W. (2) 547 .. 4
Truax v. Corrigan, 257 U. S. 312 19

United Construction Workers v. Laburnum, 347 U. S. 656 ..... 13, 20

Weber v. Anheuser-Busch, 348 U. S. 468 ..... 13, 14

Statutes Cited.

Title 28, United States Code, Section 1257 (3) 3, 6
Missouri Constitution 1945:
Article V, Sections 4, 10 2
Article I, Section 29 ..... 3, 4, 5, 9, 15
Article I, Section 14 19
United States Constitution:
Fifth Amendment 2, 5, 6, 10, 19
Tenth Amendment 6
Fourteenth Amendment 5, 6, 10, 19
National Labor Relations Act, as amended, Title 29, United States Code, Section 151 et seq.:
Section 3 (b) 6, 17
Section 3 (d) 6, 17
Section 7 ..... 3, 4, 5, 10, 14, 15
Section 8 ..... 4, 10, 15, 16, 23
Section 8 (a) (3) 6, 16
Section 8 (b) (1) (A) 6, 16
Section 8 (b) (2) 16
Section 9 13
Section 10 (a) 6, 10, 17, 18

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. .....

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

JOHN DOE et al. (Whose Names Are Otherwise Unknown to Plaintiff); NICHOLAS M. BLASSIE, AUGUST GIESEKE, Individually and as Representatives of LOCAL UNION NO. 88; and LOCAL UNION NO. 88, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

**To the St. Louis Court of Appeals,
State of Missouri.**

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Swift & Company, a corporation, prays that a Writ of Certiorari issue to review the final judgment and decision of the St. Louis Court of Appeals, State of Missouri, entered in the above entitled case which became final on October 13, 1958.

CITATIONS TO OPINIONS BELOW.

The decision of the St. Louis Court of Appeals hereby sought to be reviewed is not yet officially reported, ... Mo. App. ..., 315 S. W. [2] 465. It is printed in the record (R. 42) and in the Appendix hereto at page 25.

The decision of the Supreme Court of Missouri refusing to review the case without opinion appears in the Record (R. 8) and in the Appendix at page 34.

The opinion of the trial court appears in the Record (R. T-249), and at Appendix D, p. 35.

The opinion of the Missouri Supreme Court transferring the appeal to the St. Louis Court of Appeals on procedural grounds for decision on the merits by the St. Louis Court of Appeals is reported at ... Mo. ..., 311 S. W. (2) 15, and appears in the Record (R. 56) and as Appendix E hereto, page 42.

JURISDICTION.

The judgment of the St. Louis Court of Appeals was first entered in an opinion filed July 8, 1958 (R. 48), a copy of which is appended hereto in Appendix A at page 25. On July 22, 1958, Petitioner Swift & Company, timely filed its Motion For Rehearing Or In The Alternative To Transfer To The Supreme Court of Missouri (R. 40), which was overruled by the St. Louis Court of Appeals on September 3, 1958 (R. 33). On September 30, 1958, Swift & Company timely filed in the Missouri Supreme Court its Application For Transfer requesting that court, in the exercise of its superintending control over other courts of Missouri under Article V, Sections 4 and 10 of the Constitution of Missouri 1945, to review the Court of Appeals decision (R. 30, 8). On October 13, 1958, the Missouri Supreme Court, En Banc, denied the application without opinion (R. 8). This peti-

tion for certiorari is filed within 90 days after October 13, 1958, the date on which the St. Louis Court of Appeals opinion thus became final. On October 24, 1958, the St. Louis Court of Appeals entered its stay of mandate pending this proceeding for Certiorari (R. 4).

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code, providing for review by this court by Certiorari of final judgments of the highest court of a State in which a decision could be had where the validity of a statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, or where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

Respondent union, which admittedly represented none of petitioner's thirty salesmen and had made no direct effort to organize them in any other manner, commenced complete stranger picketing of petitioner, Swift & Company's plant at St. Louis, Missouri, which at the time had over 12,000,000 pounds of perishable food products in process.

The union's picketing was peaceful but its purpose was to force the employer, Swift & Company, by economic coercion, to coerce and compel its thirty salesmen to become members of the respondent union and to coerce the salesmen to join the union and thus to deprive the salesmen of the right to bargain collectively through representatives of their own choosing, guaranteed by Article I, Section 29 of the Missouri Constitution of 1945 and Section 7 of the National Labor Relations Act as amended.

The Missouri Supreme Court has consistently held such union conduct to be illegal, as a violation of Article I, Sec-

tion 29 of the Missouri Constitution, and Missouri law provides a remedy by way of injunction in such cases.[1]

Charges based upon such union picketing were filed by the employer with the Regional Director of the National Labor Relations Board, who refused to issue a complaint on the ground that the conduct was not within the scope of the National Labor Relations Act. This ruling was affirmed by the General Counsel, whose non-judicial rulings are non-appealable.

The St. Louis Court of Appeals nonetheless reversed the trial court injunction on the sole ground that under the doctrine of preemption the Missouri courts were precluded from exercising their historic constitutional jurisdiction to grant injunctions against unlawful conduct, by the provisions of the National Labor Relations Act.

I.

The first question presented is whether the St. Louis Court of Appeals has failed to follow the basic principles of the decisions of this Court in the field of preemption, by denying State court jurisdiction as to union conduct which is neither prohibited or protected by any provision of the National Labor Relations Act and therefore designedly left open to State control.

The St. Louis Court of Appeals did not find that the conduct here involved was protected by Section 7, or a union unfair labor practice prohibited by any of the subsections of Section 8, or conflicted with any federal administrative relief available under the Act, but applied the preemption doctrine nonetheless. The St. Louis Court of Appeals held, in effect, that the National Labor Rela-

[1] Quinn v. Buchanan, Mo. Sup., 208 S. W. (2) 413; American Hotel Co. v. Bartenders, Mo. Sup., 207 S. W. (2) 481; Bellerive C. C. v. McVey; 365 Mo. 477, 284 S. W. (2) 492; Tallman Co. v. Latal, 365 Mo. 552, 284 S. W. (2) 547.

tions Act results in complete preemption of state jurisdiction as to any controversy within its general legislative scope, without recognition that the broader rule of preemption followed in its opinion necessarily involves the application of federal preemption to areas which this Court has found were designedly left open to state control.

II.

The second question presented is whether the St. Louis Court of Appeals' denial of jurisdiction in the Missouri Circuit Court to enjoin union picketing for purposes which are admittedly illegal under Article I, Section 29, of the Missouri Constitution amounts to a complete denial of any remedy for the enforcement of the employer's substantive rights for redress against illegal conduct before any tribunal, state or federal, and thereby deprives the employer of its property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution, where the picketing involved is not conduct protected by Section 7 of the National Labor Relations Act, is not conduct proscribed as an unfair labor practice by Section 8 of the Act, and the prosecuting officers of the NLRB have refused to issue a complaint against such conduct because it is not within the scope of the Act.

III.

The third question presented is whether the National Labor Relations Act, as amended, is itself unconstitutional and void because it violates the Fifth and Fourteenth Amendments to the United States Constitution by denying petitioner any remedy for enforcement of its substantive rights for redress against illegal conduct, under the doctrine of preemption, to the extent that:

(a) it deprives petitioner of its property without due process of law by denying it access to any forum

where a Day in Court and a judicial hearing can be had to obtain a preventive remedy against continuance of unlawful conduct which has caused petitioner substantial loss and damage, in violation of the Fifth Amendment to the Constitution of the United States.

(b) it requires a state to deny petitioner any remedy for enforcement of its substantive rights and deprive petitioner of its property without due process of law under the facts involved herein in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) it causes the non-judicial, non-appealable administrative action of the General Counsel of the NLRB in dismissing unfair labor practice charges which is made without hearing or other basic essentials of due process to result in denial of all right to a judicial hearing on the merits of the case either before the National Labor Relations Board or, under the preemption doctrine, before any other judicial body.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED.

The Statutory provisions principally involved are sections 3 (a), 3 (b), 3 (d), 7, 8 (a) (1), 8 (a) (3), 8 (b) (1) (A), 8 (b) (2), and 10 (a) of the National Labor Relations Act as amended, Title 29, U. S. C., Section 151 et seq. Also involved are the 5th, 10th and 14th Amendments to the Constitution of the United States. These provisions are lengthy and are printed verbatim in Appendix F, hereto, infra.

STATEMENT OF THE CASE.

A. Material Facts.

St. Louis Independent Packing Company, a division of Swift & Company, operates a meat packing plant in the city of St. Louis, Missouri, where it employs over 2400 employees (Tr. 96-4, 7, 126). The plant had over 12,000,000 pounds of perishable food products (Tr. 96-13, 96-14-123) in process which are produced under rigidly controlled government inspection and prescribed conditions such as temperature controls (Tr. 96-93A). Such processes vary in time for particular products, ranging as high as 120 days for certain sausages (Tr. 96-13), and cannot be interrupted without violation of federal food regulations and extreme loss of value in the product itself. Products which have completed their process must be promptly moved into the market and consumed or they deteriorate greatly in value or spoil completely (Tr. 96-20, 96-21). No adequate facilities were available to preserve such products by freezing or storage (Tr. 96-16, 96-17, 124). All production and maintenance labor and drivers at the plant were represented by a certified local of the Brotherhood of Packinghouse Workers, or by another local of that union or a Teamsters local (Tr. 96-8, 126). At the time involved, none of these employees or unions had any dispute with Swift (Tr. 96-11, 126-128).

Prior to September 10, 1953, Local 88 of the Amalgamated Meat Cutters and Butcher Workmen of North America, which represented over 2,000 butchers and meat department employees (Tr. 96-142) in the retail markets in St. Louis, decided to "organize" the white collar salesmen employed by all the packing companies in the St. Louis area to call on the retail markets (Tr. 96-148 to 96-150). Purchases by the markets from these salesmen were generally made through the butcher members of Local 88.

After a campaign marked by organizational picket lines (Tr. 96-154), threats, and boycotts, Local 88 succeeded in "organizing" the salesmen of all but the three largest plants in the St. Louis area (Tr. 96-190, 96-252).

The union turned its efforts on Swift & Company in September, 1953 (Tr. 96-29, 96-202). A letter was sent to the Company by the union threatening to picket in 8 days because the salesmen were non-union (Tr. 96-29). The physical facts above described made it impossible for Swift to protect its inventory on that short notice. The pickets established on September 10, 1953 (Tr. 96-202) were placed 24 hours a day (Tr. 96-44, 96-99) at all truck and rail entrances so as to strangle the plant's transportation facilities (Tr. 96-33 to 42) but other entrances used by employees and the public generally where "advertising" value could be obtained were not picketed (Tr. 96-37, 38). The production employees crossed the line and worked. The Teamsters employees refused to make deliveries (Tr. 96-44 to 47). Truck line common carrier service stopped (Tr. 96-46). Rail service stopped but was partially restored with supervisory crews (Tr. 96-47).

Local 88 did not represent a single Swift salesman in the group they sought to organize; the picketing was 100% stranger picketing (Tr. 36). The union admitted it had no labor dispute whatsoever with the Company (Tr. 96-176, 177). Its officers admitted they had made no effort whatsoever to organize these salesmen by the usual legitimate methods of direct persuasion, either prior to the commencement of picketing or during the pendency of the litigation (Tr. 96-162, 96-430). The union relied on the picket line to accomplish its organizing for it.

The circuit court for the City of St. Louis, a Missouri trial court of general jurisdiction, enjoined the picketing (Tr. 259). It found that the picketing was not for the innocuous "advertising and publicity" purpose alleged by

the union, but was instead intended to force union membership on these salesmen through the economic coercive power of the picket line applied both directly on the salesmen and indirectly on them by coercing Swift & Company to compel them to join the union (Tr. 255-258). The circuit court held that picketing for such purpose was illegal as violative of Article I, Section 29 of the Missouri Constitution of 1945 which guarantees employees the right to bargain through representatives of their own choosing (Tr. 256). The circuit court considered the problem of federal preemption and decided that, under the circumstances here, it had jurisdiction (Tr. 252).

The union appealed to the Missouri Supreme Court which transferred the appeal to the St. Louis Court of Appeals without decision on the merits of the preemption argument (R. 56-67). In the course of determining that original appellate jurisdiction lay in the Court of Appeals, the Missouri Supreme Court held that the union conduct found by the trial court was clearly illegal under Missouri law (R. 62-64). The Missouri Supreme Court found that the union's purpose violated Article I, Section 29 of the Missouri constitution which forbids coercion of employees in the choice of their collective bargaining representatives by anyone and thus has general application to unlawful coercion from any source, and is not limited in its application to labor unions (R. 62, 63).

In the decision here sought to be reviewed, the St. Louis Court of Appeals reiterated the Supreme Court's holding that the conduct enjoined by the trial court was clearly illegal under the Missouri Constitution and thus enjoinable under Missouri law (R. 19). However, it apparently determined that the petition filed in the trial court set up "an issue within the legislative scope of the Taft-Hartley Act" and on this basis concluded that "the state circuit court was obliged to decline jurisdiction in deference to NLRB" (R. 19). The Court of Appeals did **not** find that such con-

duct was specifically protected by Section 7 of the Federal Act. It did **not** find that it was specifically prohibited by Section 8 of the Federal Act. It did **not** find that the Federal Act provided a substitute remedy for the traditional state remedy granted by the trial court. It did **not** find that plaintiff could obtain a day in court or be heard by any federal judicial or quasi-judicial tribunal, or that the union conduct involved was governed by the National Labor Relations Act. Nevertheless, the Court of Appeals held that the scope of that Act was so all-inclusive that it preempted state jurisdiction here and reversed the trial court on that sole ground. In so holding, it relied on what it deemed to be an analogy between this case and Guss v. Utah LRB, 353 U. S. 1, in concluding that, in the absence of a cession agreement under Section 10 (a) of the Federal Act, the state court was not revested with jurisdiction by the General Counsel's refusal to issue a complaint which finally blocked access to any remedy before the NLRB. The Court of Appeals' opinion did not specifically consider or discuss the Petitioner's contention that its action resulted in a denial of due process in violation of the 5th and 14th Amendments, even though that issue was extensively briefed by Petitioner (R. 1-8).

This case thus presents an issue fundamentally different from this Court's recent preemption decisions but analogous to the one presented in International Union v. WERB, 336 U. S. 245, where state jurisdiction was sustained. The particular union conduct involved is not protected by Section 7 of the Act. It is not specifically prohibited by Section 8. In fact the Regional Director of the National Labor Relations Board refused to issue a complaint against it because it was "not within the scope" of the Act. The General Counsel of the Board affirmed that refusal, and this non-judicial stand is not appealable to any judicial tribunal. This case has not been, will not be, and cannot be considered by the federal labor tribunal, the 5 member

Labor Board. The federal Act and the federal Board are impotent to act against this unlawful conduct because it is outside the scope of the Act. It is, therefore, in this Court's language, "governable by the state or entirely ungoverned."[2]

B. The federal questions were timely raised.

The first federal question as to the applicability of the preemption doctrine itself under the National Labor Relations Act was raised at the first opportunity by the Respondent Union in its Answer and thereafter vigorously argued and briefed by both sides at every succeeding stage of this litigation.

The second federal question of due process and the third question as to the constitutionality of the National Labor Relations Act as here applied did not actually become directly involved until the decision of the St. Louis Court of Appeals was entered. The trial Court having ruled in favor of, and having exercised, its own jurisdiction, plaintiff was not denied due process nor was it denied a remedy because of preemption by the National Labor Relations Act until that decision was reversed. Nevertheless, the trial court was fully advised of the effect that abdication of its jurisdiction would have on due process and the question of due process was extensively briefed by the Petitioner on the Respondent union's appeal to the Missouri Supreme Court (R. 53-73, 74 and R. 41 to 52). After transfer, the St. Louis Court of Appeals heard the case on the briefs originally filed in the Missouri Supreme Court and thus was fully apprised of the effect its reversal of the trial court would have on due process. This issue was thereafter fully briefed in the Motion for Rehearing in the St. Louis Court of Appeals (R. 40-4, 5, 13

[2] International Union v. WERB, 336 U. S. 245; Weber v. Anheuser-Busch, 348 U. S. 468.

to 16) and in the Application for Transfer filed in the Missouri Supreme Court (R. 30, 2, 3, 9, 10).[4] This issue was, therefore, timely raised at the first opportunity. The St. Louis Court of Appeals did not mention the issues of Due Process and constitutionality of the Act in its principal opinion, and the motions for rehearing or transfer to the Missouri Supreme Court were denied without opinion.

REASONS FOR GRANTING THE WRIT.

This case presents the extreme situation in which the doctrine of federal preemption, originally limited to cases of either (1) procedural conflict between administrative remedies expressly applicable under the National Labor Relations Act and the traditional remedies afforded by injunction proceedings in the state courts or (2) substantive conflict between federally protected rights and State law, has been so expanded that the basic rationale of the doctrine has been abandoned and it is now applied in a situation where no possible conflict exists in either field. The result is to defeat an employer's right to a judicial hearing on the merits before any agency of any government, state or federal, upon a clear violation of State law.

The extension of the preemption doctrine to such extremes is unwarranted as a matter of principle because it is thereby applied to situations in which it has no meaning or purpose. It is unconstitutional because it deprives the employer of any forum in which he may obtain a judicial determination of his right to preventive relief against conduct which is clearly illegal under state law and neither prohibited nor sanctioned by any provision of the National Labor Relations Act.

---

[4] This issue of due process was also raised, briefed and decided in accordance with the view here asserted by Petitioner in a collateral phase of this same litigation. See NLRB v. Swift & Co., 130 F. S. 214.

A. The Denial of State Court Jurisdiction Under the Facts of This Case Is Contrary to International Union v. WERB and Other Controlling Decisions.

Weber v. Anheuser-Busch was explicit in holding that the substantive provisions of the Taft-Hartley Act "did not exhaust the full sweep of legislative power over industrial relations given by the Commerce clause."[5] On the contrary "Congress designedly left open an area for state control."[6] **Busch** summarized the earlier cases and concluded that the fundamental basis of preemption, and the necessary condition precedent for its application, was conflict of federal and state regulation. If no such conflict exists, the state procedure survives.[7] **Busch** listed the specific areas where conflict sufficient to sustain preemption can occur as (a) state prohibition of the exercise of rights protected by Section 7 of the federal Act, and (b) state prohibition of conduct which the federal Act has specifically declared to be an "unfair labor practice" and regulated under Section 8 thereof.[8]

At the same time, **Busch** was equally explicit in establishing that the area which Congress designedly left open to state control included regulation of conduct neither prohibited nor protected by the Federal Act, that is, neither specifically sanctioned by Section 7, nor proscribed by Section 8. In every case where this Court has applied preemption, the fact situation, considered on a case-by-case basis, will be found to conform to the test announced in **Busch**.

---

[5] 348 U. S. 468.

[6] International Union v. WERB, 336 U. S. 245.

[7] United Constr. Wkrs. v. Laburnum, 347 U. S. 656.

[8] We can dismiss from further consideration as wholly inapplicable here cases involving preemption through conflict with Section 9 certification procedures. La Crosse Tel. Corp. v. WERB, 336 U. S. 18.

The decision of the St. Louis Court of Appeals in this case fails to apply that test and, instead, directly violates it. The Court below did not, and could not, find that the union conduct constituting the subject matter of this case was protected by Section 7 of the federal Act. It did not, and could not, find that it was prohibited as an unfair labor practice by any specific subsection of Section 8 of the federal Act. In such case, the necessary condition precedent for application of the preemption doctrine does not exist because "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board."[9] This Court has repeatedly held that such "conduct is governable by the state or it is entirely ungoverned" and has sustained state jurisdiction for that reason.[10]

But the St. Louis Court of Appeals held exactly to the contrary and decreed itself to be preempted even though no preempting actual or potential conflict with federal regulation exists. It has thus done precisely what this Court did not permit or require: it has abdicated jurisdiction in a case where the state court is the only judicial tribunal with power and jurisdiction to act and has left the illegal conduct here involved completely ungoverned. Such application has perverted a rational rule, originally designed to prevent a conflict of two jurisdictions, into an unfounded, unconstitutional one withdrawing all judicial regulation in this area. The resultant jural vacuum is abhorrent to the law and contrary to this Court's decisions.

The conduct here involved could not possibly be federally protected by Section 7 of the Act. It was held by the St. Louis Court of Appeals to be illegal under Missouri

---

[9] International Union v. WERB, supra.

[10] Weber v. Anheuser-Busch, supra; International Union v. WERB, supra; Algoma P & V Co. v. WERB, 336 U. S. 301.

law as violative of Article I, Section 29 of the Missouri Constitution. That Section guarantees employees a free choice of bargaining representative uncoerced by anyone; and as a matter of substantive policy is in complete accord with, not in conflict with, Section 7 of the federal Act.

Section 7 states policy only and contains no preventive remedies. Its policy can only be enforced by the NLRB to the extent that specific violations thereof are declared to be unfair labor practices in Section 8. The legislative pattern is to declare a broad policy in Section 7 and provide remedies against specific violations in Section 8. However, it is equally clear that Section 7 was not intended to protect every concerted activity not specifically prohibited by Section 8—"It does not mean that otherwise illegal action is made legal by concert."[11] The Committee Report points out, and this Court held that "the courts have finally established the rule that under the existing provisions of Section 7 of the NLRA employees are not given any right to engage in unlawful or other improper conduct."[12] It is clear, beyond doubt that this conduct, illegal under the Missouri Constitutional provision, and contrary to the general policy of Section 7 of the federal Act, cannot be considered protected by the same section. Exercise of jurisdiction by Missouri Courts to regulate such conduct could not possibly conflict with the protective policy of the federal law.

Nor could it conflict with the preventive remedies of Section 8 of the federal Act because Congress made "no express delegation of power to the Board to permit or forbid this **particular** union conduct from which an exclusion of state power could be implied."[13] Congress only

---

[11] International Union v. WERB, 336 U. S. at 258.

[12] Id., loc. cit. 260.

[13] Id., loc. cit. 253.

prohibited certain enumerated practices, and other conduct not enumerated, but similar, is not preempted but remains under state control.[14] Except for those unfair practices specifically "(listed in Section 8)" the states are free to characterize and regulate "any wrong of any kind" as an unfair practice.[15]

None of the enumerated practices specifically listed in Section 8 and thus prohibited by the federal Act are involved here. Only two of them have even been mentioned by defendants as possibly having any application and these are the ones which were considered by the Regional Director. His conclusion that this conduct was not within their scope was obviously correct. Section 8 (b) (1) (A) applies only to **violent** union coercion of employees and has no application to economic coercion through peaceful picketing. That section "**does not** specifically sanction" peaceful coercive conduct; nevertheless, such conduct "is not prohibited" thereby. The legislative history of this section and decisional precedents confirm that view. So held the District of Columbia Court of Appeals on November 26, 1958, in Drivers Local 639 v. NLRB, 43 LRRM 2156.

Similarly, Section 8 (b) (2) of the Act is not applicable here because that section specifically applies only to union coercion of employers to violate Section 8 (a) (3) and there is no evidence of any such effort here. While the union conduct here in some respects resembles the conduct proscribed by Section 8 (b) (2), it is not the same. It is therefore "not within the scope" of that section and cannot be regulated by the Board, as the General Counsel

---

[14] See Goodwins, Inc., v. Hagedorn, N. Y. Ct. of App., 303 N. Y. 300, 101 N. E. (2) 697; and Adams Dairy v. Burke, Mo. Sup., 293 S. W. (2) 281, both relying on International Union v. WERB, 336 U. S. 245.

[15] Algoma P & V Co. v. WERB, 336 U. S. 301 at 305-306.

recognized and ruled. Such conduct is neither prohibited nor protected by this section of the federal Act. NLRB v. Electronics Equipment Co., Inc., 194 F. (2) 650, 652.

The Regional Director of the NLRB dismissed the charges filed by Swift because the conduct alleged was "not within the scope of the Act." The General Counsel agreed, and that administrative decision that no prosecution was possible under the Act was final and non-appealable. The jurisdiction of the Federal tribunal itself, the 5-member Board, was never invoked because it was obviously powerless to act. There was, and can be, no federal judicial proceeding regarding this conduct. The strictly administrative action of the prosecuting officials in refusing to prosecute because the charge was outside the scope of the federal Act was not a judicial exercise of "jurisdiction" in any sense of the word. In the first place, their action was inherently not judicial in nature—there was no complaint, hearing, evidence, findings, or review. In the second place, Congress intentionally withheld all judicial powers from the General Counsel in order to divorce the prosecuting and judicial functions of the Board and lodge them in separate persons completely independent of each other. In fact the Act specifically prohibits the Board from delegating any of its judicial powers to anyone but a panel of its own judicial members.[16]

In spite of the absence of any conflict with federal protection or prohibition, and in spite of the demonstrated absence of any federal power in the NLRB to deal with this conduct, the St. Louis Court of Appeals held that the Act had "so completely displaced state power" to deal with labor relations that a "state may act only where NLRB has ceded jurisdiction pursuant to Section 10 (a)."

[16] See Section 3 (b) and 3 (d) of the Act; Haleston Drug Stores, Inc., v. NLRB, 187 F. (2) 418, 421; Evans v. I. T. U., 76 F. S. 881, 889.

In so holding, the St. Louis Court of Appeals misapplied this Court's controlling decisions in two decisive respects.

First: The **Guss** case and its companion cases[17] held a Section 10 (a) cession necessary to **revest** jurisdiction in the states where the Act had clearly **divested** it and lodged it with the NLRB. In those cases this Court rejected the contention that jurisdiction **revested** in the States when the Board declined to act in cases where it clearly had the power to do so, solely because of the small volume of commerce involved. **Guss** held that the boundaries of the Board's jurisdiction are not dependent on volume of commerce. Its power over the unfair labor practices "(listed in Section 8)" is plenary, and such practices were specifically involved in those three cases. The **Guss** decision is inapplicable here because absence of preempting federal jurisdiction is not based on insufficient volume of commerce—it is based on the more fundamental absence of Congressional intent to take this particular conduct in hand or to permit the Board to deal with it in any case. Where the Board has not been given jurisdiction over particular conduct in the Act, it has nothing that it could cede by a Section 10 (a) agreement.

Second: No cession agreement is needed to **revest** state jurisdiction over this case because it was never **divested** in the first place. In considering this precise question of the scope of Section 10 (a) this Court specifically stated: "Where the state and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired." Algoma P & V Co. v. WERB, 336 U. S. at 313.

Accordingly, Petitioner submits that the opinion of the St. Louis Court of Appeals has completely misapplied this Court's controlling decisions and, as a result, has decided

---

[17] Guss v. Utah LRB, 353 U. S. 1; AMC & BW v. Fairlawn, 353 U. S. 20; San Diego BTC v. Garmon, 353 U. S. 26.

this substantial federal question contrary to their command. The difficulty the courts have encountered in applying the preemption doctrine in this area is widespread. Numerous cases, in the various state courts, are arising frequently, with almost as many different decisions as there are cases. The bench and bar both look to this Court to cast light on this part of the "penumbral area."

B. The Denial of Any Judicial Hearing on the Merits of This Case Presents a Substantial Federal Constitutional Question Under the Fifth and Fourteenth Amendments Not Heretofore Determined by This Court.

The Fifth and Fourteenth Amendments to the United States Constitution command that no person shall "be deprived of life, liberty, or property without due process of law."[18] In its fundamental, primary sense, this means that the plaintiff here must be afforded "an opportunity to present its case and be heard in its support"[19] and must be given "the protection of his day in court and the benefit of the general law (which) renders judgment only after trial so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."[20]

Congress is bound to observe this Constitutional requirement even in enacting labor legislation under the Commerce clause, broad as its power thereunder may be. The original Wagner Act was sustained only after this Court considered whether it had "gone beyond Constitutional limits" as to due process.[21] This Court specifically

---

[18] Cf. Art. I, Sect. 14, Missouri Constitution, 1945.

[19] Brinkerhof-Faris T & S Co. v. Hill, 281 U. S. 673, 678.

[20] Truax v. Corrigan, 257 U. S. 312.

[21] NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1, 46.

cited the statutory requirements established by that Act for complaint, notice, hearing and judicial review where "all question of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the Court."[22] This Court specifically relied on these provisions as affording "adequate opportunity to secure judicial protection" and noted that the Board's orders could only be enforced when sustained by the court.

That same requirement to preserve due process has been observed in this Court's decisions on the Act as amended by Taft-Hartley. Thus **Garner** noted that in the "particular type of controversy" there involved which Congress had "taken in hand" (i. e., an unfair labor practice), Congress had provided a "tribunal" and a procedure for complaint, notice, hearing, and judicial review. 346 U. S. at 490. And in **Laburnum** (though a federal unfair practice was also involved), the state procedure was sustained because to rule otherwise would "deprive (plaintiff) of its property without recourse or compensation". 347 U. S. at 663.

This Court has consistently recognized that application of the pre-emption doctrine in this field must be confined within the limits prescribed by the Due Process Clause, but it has never had occasion to specifically rule on the effect of due process in a case such as this. Here the judicial procedure provided in cases before the NLRB (the five member Board itself) as carefully outlined in **Garner** and **Jones & Laughlin** was never followed because the prosecuting officials with power to invoke it determined that the union conduct involved was "not within the scope of the Act." This was a final, non-judicial, non-appealable, administrative ruling that "the conduct here described is not forbidden by this Act and no proceeding

---

[22] Id., loc. cit. 301 U. S. 47.

is authorized by which the Federal Board may deal with it in any manner". Int'l Union v. WERB, 336 U. S. 245, 253. As a result, this union conduct was effectively insulated and withdrawn from any kind of judicial or quasi-judicial regulation by the NLRB and no "day in court" with judicial safeguards was, or can be, had before that federal tribunal.

When this same situation confronted the Wisconsin Supreme Court, it exercised state jurisdiction and ruled against the claim of preemption. This Court agreed:

> "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned." International Union v. WERB, 336 U. S. at 254.

Wisconsin having properly acted where the NLRB was impotent, no problem arose in that case as to due process. But the St. Louis Court of Appeals, under almost identical circumstances, has abdicated Missouri's traditional jurisdiction over this admittedly illegal conduct on the sole ground that the federal law requires it to do so. By refusing to exercise Missouri's inherent jurisdiction in this case, the St. Louis Court of Appeals has thus denied petitioners access to the **only** tribunal with jurisdiction of the subject matter and power to afford a judicial day in court. Petitioner's substantive right to a remedy against admittedly illegal conduct is not questioned, and the absence of access to a day in court or a remedy before the federal tribunal is conceded. Abdication of state jurisdiction under those circumstances violates Due Process.

The dilemma faced by the state courts in a situation like this is not limited to the St. Louis Court of Appeals.

The same problem in essence has already arisen elsewhere and has been decided in conflicting ways.[23] It will continue to confuse the courts and litigants until it is authoritatively decided by this Court. The widespread application and general importance of this issue cannot be overestimated.

C. The National Labor Relations Act as Interpreted and Applied by the St. Louis Court of Appeals Unconstitutionally Denies Due Process of Law in Violation of the Fifth and Fourteenth Amendments.

If the St. Louis Court of Appeals did not err in its construction of the National Labor Relations Act and the Act does require Missouri Courts to withhold exercise of their inherent general jurisdiction in this case, then the National Labor Relations Act is itself unconstitutional and void to that extent as violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

All of this Court's preemption decisions have scrupulously applied that doctrine. **Jones & Laughlin,** and **Garner,** supra, both carefully detailed the judicial federal procedure available to parties who were thus denied access to the state courts. In each case, a federal Day in Court was substituted for the withdrawn state procedure. And where no substitute was provided, the state procedure was held to necessarily survive. **Laburnum,** supra. In every preemption case where this court has denied state jurisdiction, it has clearly demonstrated that judicial jurisdiction

---

[23] See Goodwins, Inc., v. Hagedorn, 303 N. Y. 300, 101 N. E. (2) 697; Pleasant Valley Packing Co. v. Talarico (N. Y. Ct. of App.), 35 Labor Cases, para. 71,639; NLRB v. Swift & Co., 130 F. S. 214; Adams Dairy v. Burke (Mo. Sup.), 293 S. W. (2) 281, cert. den. 352 U. S. 969; Johnson v. Grand Rapids B & CTC (Mich. Circ. Ct.), 33 Labor Cases, para. 70996; Dougherty v. Commonwealth (Va. Sup.), 33 Labor Cases, para. 71110; Hammer v. Textile Workers (N. J.), 111 A. (2) 308; Freydberg, Inc., v. ILGWU, 128 N. Y. S. (2) 470.

with power to grant appropriate relief and protection of rights existed in some other tribunal. Never yet has this Court permitted complete judicial anarchy with jurisdiction and power in no court, state or federal.

The Act expresses no purpose to affirmatively protect this illegal conduct. It makes no effort to change the pre-existing substantive law that condemned such conduct and provided remedies. But as applied by the St. Louis Court of Appeals, it is void as denying due process by removing all remedy for the protection of recognized substantive rights. In addition, petitioner is denied its Day in Court before any tribunal where it can be heard to obtain a remedy against unlawful destruction of its property.

In International Union v. WERB, 336 U. S. 245, the state court made its own determination that it could and should regulate unlawful union conduct similar to but not the same as that expressly prohibited by Section 8 of the Act which the Board could control. This Court affirmed that decision. Here, the Missouri trial court reached the same conclusion as did Wisconsin, fortified in its decision that no federal unfair practice was involved by the flat statement of the Board's General Counsel that such conduct was "not within the scope" of the Act. But the St. Louis Court of Appeals reversed because the General Counsel's denial of power to proceed before the Board was an "exercise of jurisdiction", and a "disposition on the merits".

We submit that the General Counsel has no judicial power or jurisdiction, that he is not bound in any way to afford due process, that he holds no hearing, makes no findings, and is not judicially reviewable. He has no "jurisdiction" to exercise and no power to make a judicial "determination" on the merits. He is a prosecutor, not a judge. Even when he decides to issue a complaint, he proceeds before the Board itself as a litigant with the

same standing as any other party. To permit preemption of state judicial jurisdiction on the basis of such a perfunctory administrative decision violates due process and voids the statute.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

WALTER R. MAYNE,
G. CARROLL STRIBLING,
HAROLD A. THOMAS, JR.,
FORDYCE, MAYNE, HARTMAN, RENARD & STRIBLING,
506 Olive Street,
St. Louis 1, Missouri,

EARL G. SPIKER,
711 Fourteenth Street N. W.,
Washington 5, D. C.,

Attorneys for Petitioner
Swift & Company.

APPENDIX "A".

In the
ST. LOUIS COURT OF APPEALS,
April Session, 1958.

Swift & Company, a Corporation, and Missouri Pacific Railroad Company, a Corporation (Intervenor), (Plaintiffs) Respondents, vs. John Doe et al. (Whose Names Are Otherwise Unknown to Plaintiff); Nicholas M. Blassie et al., (Defendants) Appellants.	No. 30,118 Appeal from the Circuit Court, City of St. Louis. Hon. Waldo C. Mayfield, Judge. Opinion Filed July 8, 1958.

This is an appeal from an order of the Circuit Court of the City of St. Louis granting a permanent injunction against picketing. This appeal, originally taken to the Supreme Court, was transferred to this court for decision. The transfer opinion, Swift & Company v. Doe, Mo. Sup., 311 S. W. 2d 15, clearly and succinctly states the factual background, pleadings, evidence, issues determined below and those preserved for review and briefed on appeal. Entirely sufficient for our purposes, we refer to, adopt and need not repeat here the first fifteen paragraphs of the transfer opinion written by Commissioner Holman, 311 S. W. 2d, loc. cit. 17, 18, 19 and 20.

Appellants-defendants' first contention is that the trial court had no jurisdiction of the subject-matter. The principal question is whether peaceful, orderly stranger picketing of the premises of an employer engaged in interstate commerce, the object of which is to force, coerce and in-

timidate unorganized employees to join a union or to force, coerce and intimidate the employer, by economic pressure, to force, coerce and intimidate the employees to join a union, is an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board, withdrawn under the doctrine of pre-emption from the orbit of state control, or whether such picketing is outside the field of federal pre-emption and therefore subject to regulation by a state equity court under state law. Related questions are (1) the effect of the dismissal of charges filed by Swift with NLRB; (2) the right of Missouri Pacific to resort to the state circuit court for injunctive relief.

Laws of the Congress made in pursuance of the Constitution of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Constitution, Article VI. In the field of Federal-State relations we are bound by and must follow the decisions of the Supreme Court of the United States.

Under the controlling decisions of the Supreme Courts of the United States and of Missouri the state circuit court lacked jurisdiction to issue the injunction upon the petition of Swift. Congress, intending to reach to the full extent of its power under the Commerce Clause, Guss v. Utah Labor Relations Board, 353 U. S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601, has pre-empted the field in labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in NLRB to determine labor disputes involving unfair labor practices which are either protected or prohibited by the Taft-Hartley Act. Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, AFL, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228; Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546; Graybar Elec. Co. v. Automotive, Petroleum & Allied Industries

Emp. Union, Local 618, 365 Mo. 753, 287 S. W. 2d 794; Swope v. Emerson Elec. Mfg. Co., Mo. Sup., 303 S. W. 2d 35; Jack Cooper Transport Co. v. Stufflebeam, 365 Mo. 250, 280 S. W. 2d 832.

In Weber, supra, the court said, 348 U. S., loc. cit. 481:

> "* * * where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

Swift's petition specifically alleged that defendants' acts constituted unlawful picketing in violation of the Taft-Hartley Act. Unfair labor practices reasonably bringing the controversy within the provisions of the Act were charged. Garner; Graybar. Defendants' answer denied these charges. This presented an issue within the legislative scope of the Taft-Hartley Act and it follows that the state circuit court was obliged to decline jurisdiction in deference to NLRB, Garner; Weber; Stufflebeam; Swope, notwithstanding the same acts are unlawful under state policy.[1]

What is the effect of the refusal of the federal administrators to issue a complaint? The specific conduct relied upon as the basis of the charge of an 8 (b) (1) (A)[2] and

---

[1] In Missouri picketing for the purposes indicated has repeatedly been held to violate the free choice guaranteed to employees by 29, Art. I, Constitution of Missouri, 1945. Swift & Company v. Doe, supra; Quinn v. Buchanan, Mo. Sup., 298 S. W. 2d 413; American Hotel Co. of Mo. v. Bartenders' Inter. League of America, Local No. 422, Mo. Sup., 297 S. W. 2d 411; Bellerive Country Club v. McVey, 365 Mo. 477, 284 S. W. 2d 492; Tallman Co. v. Latal, 365 Mo. 552, 284 S. W. 2d 547.

8 (b) (2)[2] violation was that of "Picketing and threatening to picket * * * for the purpose of thereby inflicting such severe economic pressure on said employer through disruption of transportation service, spoilage of product in inventory, and loss of business that such employer will thereby be forced to compel or influence its city salesmen to join the said union which said action on the part of the employer would be in violation of Sections 8 (a) (1) and 8 (a) (3) of the Act, * * *." The charge did not contain the additional allegation made in the petition in the state circuit court, that the purpose of the picketing was to directly force and influence Swift's city salesmen to join the union. The Regional Director, after carefully investigating and considering the case, refused to file a complaint and dismissed the charges, considering that further proceedings were not warranted "inasmuch as the charge alleges activities that do not fall within the scope of Sections 8 (b) (1) (A) or 8 (b) (2)." On appeal the General Counsel sustained the ruling of the Regional Director and "concluded that both the legislative history of the Act and decisional precedent determine that * * * the peaceful picketing * * * (was) not violative of the Act" and that further proceedings were not warranted. We construe the ruling of the General Counsel to be a final determination that the facts charged did not constitute a violation of the Act . . . that the complaint did not state a case under the Act . . . and not (as the union would have us say) that by his ruling the General Counsel or NLRB "sanctioned the picketing," or (as Swift would have us say) that the ruling meant that NLRB had no jurisdiction under the Act, thereby destroying the entire basis for the application of the doctrine of pre-emption and leaving the state circuit court free to exercise its traditional jurisdiction. The ruling of the General Counsel was not a renunciation, dis-

---

[2] Labor Management Relations Act 1947, § 158 (b) (1) (A), (b) (2).

avowal or abnegation of jurisdiction of NLRB to entertain the proceeding if a proper complaint had been filed. It was an exercise of jurisdiction by the officer who is vested with final authority[3] on behalf of NLRB in respect of the investigation of charges and issuance of complaints, whereby he determined that the particular charges did not violate the Act. It was the construction of a statute, involving an exercise of judgment. No appeal from such a ruling by the General Counsel is provided for in the Act,[4] and his ruling, right or wrong, was final and terminated the proceeding. In Graybar, the refusal of the General Counsel to issue a complaint, following an investigation of the charges, on the ground that there was "insufficient evidence to warrant further proceedings" was held to constitute an exercise of jurisdiction by NLRB and a disposition of the case on the merits, and his dismissal of the charges was held not to revest jurisdiction in the state circuit court. Here the ruling of the General Counsel constituted an exercise of jurisdiction, and his dismissal of the charges did not revest jurisdiction in the state court. Graybar; Swope; Guss; Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc., 353 U. S. 20, 77 S. Ct. 604, 1 L. Ed. 2d 613; San Diego Bldg. Trades Council v. Garmon, 353 U. S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618, and Retail Clerks Local No. 1564, AFL, v. Your Food Stores of Santa Fe, C. A. N. M., 225 F. 2d 659. In the absence of a cession of jurisdiction under § 10 (a)[5] of the Act [absent here and impossible since Missouri has no labor "agency" as contemplated by § 10 (a)] the state circuit court had no jurisdiction to entertain the petition of Swift.

---

[3] Labor Management Relations Act 1947, § 153 (d), 29 U. S. C. A.

[4] Labor Management Relations Act 1947, § 153 (d), 29 U. S. C. A.; NLRB v. Swift & Co., C. A. Mo., 233 F. 2d 226; Lincourt v. NLRB, C. A., 170 F. 2d 306.

[5] Labor Management Relations Act 1947, § 160 (a), 29 U. S. C. A.

The opinions of the United States Supreme Court in Guss, Fairlawn and Garmon, handed down after the entry of the judgment from which this appeal is taken, indicate that by vesting in NLRB jurisdiction over labor relations in cases affecting interstate commerce Congress has so completely displaced state power to deal with such relations that even in cases where NLRB has declined to proceed (for policy or "other" reasons) the states may act only where NLRB has ceded jurisdiction pursuant to said § 10 (a). In Guss the United States Supreme Court recognized the problem involved in cases such as this, where NLRB declines jurisdiction and the states are forbidden to exercise it (the creation of "a vast no-man's-land, subject to regulation by no agency or court"), but adhered firmly to the view that Congress has expressed its judgment in favor of uniformity and that "its judgment must be respected whatever policy objections there may be to creation of a no-man's-land." The court suggested that Congress can change the situation at will and that NLRB can reduce the area of the no-man's-land "by reasserting its jurisdiction and, where States have brought their labor laws into conformity with federal policy, by ceding jurisdiction under § 10 (a)."

Nor under the controlling decisions did the circuit court have jurisdiction to issue the injunction upon the intervening petition of Missouri Pacific. In its original petition (filed before Garner was handed down) Missouri Pacific took the firm position that the picketing violated Taft-Hartley, and in its trial brief forcefully argued that the picketing violated § 8 (b) (4) of the Act. After Garner was decided these allegations by leave were eliminated from the railroad's petition but were read in evidence as an admission against interest. Having alleged unfair labor practices under the Act Missouri Pacific is confronted with the language of Weber quoted in the first part of this opinion. Did the facts alleged "reasonably bring the con-

troversy within the sections prohibiting these practices?" Missouri Pacific alleged that the purpose of the picketing was to coerce Swift salesmen to join the union, and to coerce Swift to coerce the salesmen to join, "contrary to the express provisions of the Labor Management Relations Act (Taft-Hartley Act) * * *," and that the members of the union conspired together to prevent the railroad from discharging its statutory duty to render efficient and indiscriminate transportation service to Swift by picketing Swift's plant at the point where the spur tracks enter Swift's premises, whereby the railroad's regular employees (members of three brotherhoods) would not cross defendants' picket line to switch loaded and empty railroad cars in and out of Swift's property, and thus refused to serve the Swift plant. Section 8 (b) (4) (A) of the Act [29 U. S. C. A., § 158 (b) (4) (A)] provides that it shall be an unfair labor practice,

> "* * * to induce or encourage the employees of any employer to engage in, * * * a concerted refusal * * * to * * * transport, or otherwise handle * * * any goods * * * where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease * * * transporting * * * the products of any other producer * * * or to cease doing business with any other person * * *."

A railroad is an "employer" within the meaning of § 8 (b) (4) (A), for the reasons stated in International Rice Milling Co. v. NLRB, C. A. 5, 183 F. 2d 21, and W. T. Smith Lumber Co. v. NLRB, C. A. 5, 246 F. 2d 129, entitled as such to protection by NLRB from the kind of unfair labor practices proscribed by § 8 (b) (4) (A). Local Union No. 25, International Brotherhood, T. C. W. & H. v. New York, N. H. & H. R. Co., 350 U. S. 155, 76 S. Ct. 227, 100 L. Ed. 166. Missouri Pacific's intervening petition alleges facts which reasonably bring the controversy within § 8 (b) (4) (A). The railroad contends otherwise upon

the basis of two administrative rulings of the General Counsel of NLRB,[6] but we adhere to the views expressed in International Rice Milling Co. that the inducement of the employees of a railroad (a neutral employer) not to transport goods, by picketing at the situs of the primary employer's place of business, is prohibited by § 8 (b) (4) of the Act, the purpose of which is to protect interstate commerce from injury, impairment, and interruption "by removing obstructions such as the one we have here." And see Wichita Falls & Southern R. Co. v. Lodge No. 1476, Tex. Civ. App., 266 S. W. 2d 265, and Penello v. Seafarers' Intl. Union, D. C. Va., 40 LRRM 2180. NLRB was the exclusive primary tribunal to determine whether the picketing involved constituted an unfair labor practice as to Missouri Pacific and the state circuit court had no jurisdiction to entertain Missouri Pacific's intervening petition for the reasons given and under the authorities cited in connection with our review of the trial court's action on Swift's petition.

Accordingly, the order of the circuit court should be reversed and the permanent decree of injunction dissolved, and the Commissioner so recommends.

Norwin D. Houser, Commissioner.

Per Curiam:

The foregoing opinion of Houser, C., is adopted as the opinion of the court.

The order of the circuit court is, accordingly, reversed and the permanent decree of injunction dissolved.

E. M. Ruddy, Presiding Judge, Concurs.

Lyon Anderson, Judge, Concurs.

James D. Clemens, Special Judge, Concurs.

---

[6] Case No. 835, Nov. 6, 1953, 33 L. R. R. M. 1037; Case No. K-700, Oct. 15, 1956, 38 L. R. R. M. 1469.

APPENDIX "B".

September Session, 1958.

Wednesday, September 3, 1958.

Swift & Company, a Corporation, and Missouri Pacific Railroad Company, a Corporation (Intervenor),
Respondents.

vs. Circuit Court No. 67494-D, Div. No. 2.

John Doe et al. (Whose Names Are Otherwise Unknown to Plaintiff); Nicholas M. Blassie; August Gieseke, individually and as representatives of Local Union No. 88; and Local Union No. 88, Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO,
Appellants.

No. 30118.

Now at this day the Court having duly considered the motion of respondent Swift & Company, a Corporation, filed herein July 22, 1958, for a rehearing, or, in the alternative, for a transfer of the cause to the Supreme Court of Missouri, doth order that said motion be and is hereby overruled. E. M. Ruddy, Presiding Judge, Lyon Anderson, Judge, and James D. Clemens, Special Judge, sitting.

APPENDIX "C".

In the
SUPREME COURT OF MISSOURI.

September Session, 1958.

Swift & Company, a Corporation, and Missouri Pacific Railroad Company, a Corporation,

Respondents,

47246 vs. Transfer.

John Doe et al. (Whose Names Are Otherwise Unknown), Nicholas M. Blassie et al.,

Appellants.

Now at this day, on consideration of respondents' Applications to transfer the above entitled cause from the St. Louis Court of Appeals, it is ordered that said applications be, and the same are hereby denied.

State of Missouri—SCT.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1958, and on the 13th day of October 1958, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 29th day of October, 1958.

(Seal)

Marion Spicer, Clerk.

.....D. C.

APPENDIX "D".

OPINION OF THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, STATE OF MISSOURI.

Findings of Fact; Conclusions of Law; Order—Judgment—Decree.

Judge Mayfield: Gentlemen, what I say to you now constitutes Findings of Fact and Rulings of Law in this matter, and in behalf of all you gentlemen I want to compliment you for not having cast too much darkness upon the water, and I still say to you when you blow the foam off the top of this case it isn't a complicated case at all. The facts of the case are comparably simple, gentlemen, and I **FIND** them to be:

Findings of Fact.

That, Swift & Company, under the Pleadings and under the Evidence; is a Corporation, and I will refer to them as the "Employer-Plaintiff"; the Railroad Company, "Intervening-Plaintiff," likewise a Corporation, engaged in the Railroad business; the Defendants, a voluntary unincorporated Labor Association, not a sueable entity, as such, in law.

There is not, under this testimony, within the meaning of the law, a "Labor Dispute" between either one or both of the Plaintiffs and the Defendants; there is no dispute here between Swift & Company and the Defendants as to Hours, Wages, Working Conditions, or matters pertaining to Labor.

The letters addressed to and written to the Employer-Plaintiff, Swift & Company, stated that the Defendants seek to organize and want to organize their salesmen. The

letter is not addressed to the salesmen that they seek to organize.

The admissions are, they never contacted those salesmen.

They were contacting the Employer, by the letter and by the written record.

It becomes much in effect like the fellow that desires to marry the girl and is pitchin' all his woo or wisdom at her mother, never letting her, the girl, know that he has anything to say to her or about her.

Anything the salesmen would get there, or the girl would get, would be secondary.

It is possible and I find, that, maybe you have a justification to shoot at one of your neighbors in self-defense, but, if you hit the house of the other neighbor while doing so, you don't justify your conduct, if you miss your aim.

All the efforts were directed toward and to the Employer, Swift & Company, with whom there was no dispute and with whom the Pleadings admit they did not represent a majority of the Employees and had no Contract of relationship with whom and were not arguing Swift & Company should give them a Contract for these Salesmen.

Now, on your question of "Jurisdiction": The Union, here, seeks to recognize, by seeking to organize the Salesmen as a Separate Bargaining Unit under the National Labor Relations Act, that it is such, that it is a unit separate and distinct, subject to be "carved out" from the other sheet of the Employees to make its own contract.

If that be so, all this evidence shows they were not "Production" employees; they were "Maintenance" employees within the meaning of that Act.

There would be much reason why the Act wouldn't apply, because, it applies only to a situation where the con-

troversy is between two people producing the product the majority of which flows into Interstate Commerce.

These Salesmen that the letters and the evidence admit they were seeking to organize didn't have anything to do with the product going into Interstate Commerce.

The Union recognized that separate Bargaining Unit within the meaning of that Act.

You would have an entirely different thing to rule if, here, the Employer, Swift, is refusing to deal with the Defendants, or the Union, as the Contracting Agent for Swift Company and its Production Employees, the major portion of which production would go into or flow into Interstate Commerce, and Commerce would be affected by it, in the meaning and wording of the National Labor Act.

Now, further, gentlemen, on the basis of the proposition about the Jurisdiction, it is not too simple and may be a little more complicated than I deem it to be.

When you come down to the fundamental and elementary principles of the situation, we take some recognition of the fact a great deal has been lost sight of, I am sorry to say, that, there were States that were in existence before our United States Constitution came into power; that, all powers of the United States Government, gentlemen, are derivative powers, they are **not** inherent powers, they are **not** powers given to them by any right except such rights as the States conceded to them when the United States Government was organized;

That, a State, or a set of State Courts should practically be entirely abolished—and that's what the effect of this "pre-emption" is—if this be the Law, then we just as well practically abolish a great big portion of our State procedure, or our State Laws, and hand it all over to the United States Government.

The "Decisions" don't convince me, neither does the "Act of Congress" convince me, that that was their intention or that those were its rulings; and that a State Court has still **some** rights!

In the TALLMAN case, they rule—our **own** Court—that, if there was something the State Court felt demanded action on its part the State Courts would have jurisdiction.

What constitutes **demanding** it?

If this matter be pre-empted—take a commonsense viewpoint of it!—and I am using this violent illustration because I **FIND** all this picketing was peaceful—BUT, suppose there was a **RIOT** out there!

If that can pre-empt it in one instance, that will in another!

The State sits helplessly by and sees their property destroyed, and waiting for the United States Court to step in and take jurisdiction!

When the States get that helpless we better dissolve this Union and some of us go on as States.

Always there have been some fundamental and elementary Rights to preserve under a State Court as a matter of protection.

I repeat—and it was probably due to the "order" of Mr, Blassie and his companions the picketing was "peaceful"—yet, the result of that picketing, shown by this testimony here, gentlemen, would have been perilously destructive when the type of product that is involved here in this matter is considered.

It is comparable, in effect, to a wagon-load of ice standing on the street; it perishes and it is gone if something isn't done in regard to it.

That the destruction occurred peacefully does not deny or forego the fact that the destruction would have resulted.

And destruction of property, in that form, gentlemen, constitutes being an illegal act.

Findings and Conclusions of Law.

I **RULE** and **FIND** under the facts in this case, that, The State Court has Jurisdiction.

I might pay this compliment to a former Member of this Bench, Judge William B. Flynn, he so Ruled; and I likewise pay my respects to Judge Robert L. Aronson who Ruled on the Motion to Dissolve (the Temporary Restraining Order) and Held that the entire matter is **not** preempted by the Federal Acts.

It seems to me, gentlemen, there are still some Rights left in the State Courts. I am not jealous of them, but if we are going to give it all to the United States Government, that's all right with me because it will relieve us of a great many things, but, I can't see, gentlemen, that, where the matter is occurring wholly within the territorial limits of the State of Missouri and occurring entirely between citizens of this State, and there is no "product" involved here—this is not a case of production of product that flows into Interstate Commerce, and, yet, all the "Meat" was directed to the Employer, Swift & Company.

Ruling Appertaining to Intervening Plaintiff.

Now, as to the Intervenor: Having ruled that the State Court has Jurisdiction—and I admit I haven't convinced Mr. Harry (indicating Mr. Craig) of this at all——

Mr. Craig: Not at all, Judge.

(Judge Mayfield, continuing:) ——unquestionably you were no way—not by a stretch of the imagination—any party the controversy at all, and the Law imposed on you

the obligation, as a Railroad, to do a certain thing—I **FIND** the action of the Defendants in this picketing—of the Defendants in this picketing interfered with and stopped that operation and those acts were illegal. You are entitled, as Intervening-Plaintiff, to the relief sought by you.

The Employer was compelled, under Section 29 of Article I of the Missouri Constitution, to permit their employees to select a Labor Union of their own choice.

That, the Employer was caught in a helpless situation; I **FIND** they had no place to go to, and even after they got the letters from Mr. Blassie and Mr. Gieseke as representatives of the Union, what was there for them that they could lawfully do? Only to sit idly by and see their property and their product destroyed. They could not lawfully go to the Salesmen and say, "Join up with this Union and save our Product"; and if they can't stop the Union from the destruction of it, then, where are they?

I still believe the Common Law Rule and Equitable Principle premise applies, Gentlemen, and I **RULE** it does apply; that, where there is a Right, there is a Remedy!

They had a Right to and they Owned this property, they acquired it lawfully; and to have it destroyed there would have to be some controversy in which they were engaged as an Employer. They were **not** in this controversy in any manner whatsoever; there was no dispute between them and the Union; the Union was not asking Swift & Company to give them a Contract for these Salesmen; they had no lawful Right to ask for that.

It is true, and doesn't make any difference whether I agree with them or not, but I do agree with them that this Picketing was done for Organizational Purposes.

Where it is a controversy as to Employment, or where it is picketing the person you say you want to become a

Member of your Organization, you may have that Right of Freedom of Speech.

They weren't Picketing these Salesmen, gentlemen; it was the Employer that was being Picketed, and with the Employer there was no controversy, because, all the Letters and the Notices were sent to the Employer instead of Notifying the Salesmen. They (the Salesmen) were not Notified but the Employer was Notified, which would bring about only the situation, you might say—and I don't mean this in too harsh a way—it's just a little "covert" blackmail, "If you don't get your men in, we are going to black-list you"; that's what it amounts to.

There are just two ways in which Equity will interfere, and they are, in the Illegal doing of a Lawful Act, or doing something Illegally, or doing something in a Peaceful Manner that Creates Illegal Results.

The fact the Picketing here was Peaceful—and I FOUND —repeatedly FOUND it was—it created an Illegal situation.

Ruling—Decree—Order—Judgment.

I Rule that, I have Jurisdiction; that the Relief prayed for by each and both of the Plaintiffs is proper, and the matter is submitted to me on its merits; I **DENY** the MOTION OF DEFENDANTS TO DISSOLVE THE TEMPORARY INJUNCTION, and **ORDER** the Injunction heretofore Issued to be made PERMANENT: and Costs taxed against the Defendants.

APPENDIX "E".

In the
SUPREME COURT OF MISSOURI,
Division Number One,
January Session, 1958.

Swift & Company, a Corporation,
Plaintiff-Respondent.

and

Missouri Pacific Railroad Company, Corporation,
Intervening Plaintiff-Respondent,

vs.

John Doe et al. (whose names are otherwise unknown to plaintiff);

Nicholas M. Blassie; August Gieseke, individually and as representatives of Local Union No. 88;

and

Local Union No. 88, Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO,
Defendants-Appellants.

No. 45,973.

Appeal From the Circuit Court of the City of St. Louis
Honorable Waldo C. Mayfield, Judge.

Plaintiff, Swift & Company, instituted this action to enjoin the defendants from picketing its St. Louis, Missouri plant which is known as the St. Louis Independent Packing Company. The trial court granted a permanent in-

junction and defendants have duly appealed from that decree.

Since we have determined that we do not have appellate jurisdiction of this case, our factual statement will not be as complete as it would otherwise be. However, we will attempt to state such portions of the pleadings and evidence as to disclose the issues determined in the trial court and the issues briefed and preserved for review in this court.

The plant involved in this case is one of the largest packing plants in the country and plaintiff employs, in the operation thereof, approximately 2,400 employees. About 2,000 of its employees belong to the Packing House Workers Union and its truck drivers (about 40) are represented by Local 700, Packing House Chauffeurs, Warehousemen and Helpers of America. No dispute existed between plaintiff and the aforementioned unions at the time of the occurrences hereinafter detailed. The testimony indicated that plaintiff had on hand in its St. Louis plant approximately 12 million pounds of meat products at all times which were in various stages of processing involving from a few days to as long as 120 days. Its cold storage capacity was 3,800,000 pounds and the same was substantially full at all times.

The defendants are officers and members of Local Union 88, Amalgamated Meat Cutters and Butchers Workmen of North America, hereinafter referred to as the Union. That union is not incorporated and the defendants were named as representatives of the entire membership of the union. In the spring of 1952, the union started upon a campaign to organize the "white-collar salesmen" employed by various St. Louis packing houses. The employees involved in this care are plaintiff's thirty-one city salesmen who call upon the retail stores in the greater St. Louis area.

On May 15, 1952, the secretary of the union sent a letter to the plaintiff advising that the union was interested in persuading these salesmen to apply for membership in the union and that the union was contemplating establishing a picket line at the company premises in an effort to enlist public support and influence in bringing about the affiliation of these employees with the union. However, the union did not picket at that time but temporarily changed its method of approach and requested its members that were employed in markets in the St. Louis area to solicit the salesmen to become union members. In the following fifteen months the union was successful in organizing the salesmen of all but the three largest packing plants in the St. Louis area. That campaign involved picketing at the plant of the Krey Packing Company.

On September 2, 1953, the secretary of the union sent another letter to the plaintiff advising that the union intended to begin picketing the premises on September 10 for the purpose of publicizing the fact that plaintiff's salesmen were nonunion. He also stated that notice of the intention to picket was given at that time in order that plaintiff could make arrangements for handling its perishable products. On September 10, 1953, pickets were placed at transportation entrances into the plaintiff's premises and the picketing was maintained on a 24-hour basis. No pickets were placed at entrances used by the 2,400 employees of the plant or the entrance to the company's test kitchen which is visited by large numbers of housewives. The result of the picketing was to make it difficult for plaintiff to make delivery of its products to retail outlets. The company's forty truck drivers refused to cross the picket line, as did a large percentage of the drivers for commercial trucking companies. Pickets had been placed on Spring Avenue just north of the Missouri Pacific Railroad track which entered the plaintiff's plant.

Ordinarily, the railroad would handle the switching involved in icing, loading, re-icing and shipping out approximately 200 refrigerator cars of meat per day from that plant. As a result of the picketing the regular crews of the railroad refused to cross the picket line and, after some delay, the railroad company was able to obtain supervisory employees who handled at least a part of that switching. As a result of the picketing plaintiff was unable to obtain transportation facilities for a considerable part of its products that were ready for shipment to purchasers.

On the following day, September 11, plaintiff filed the instant action and obtained a temporary restraining order, as a result of which the pickets were withdrawn about 7 p. m. on that day.

Plaintiff in its petition alleged that "the sole purpose of the picketing activities of defendants herein described is to force, influence, threaten, coerce, and intimidate the said salesmen employed by plaintiff to join defendant union, contrary to the express provisions of the Labor Management Relations Act (Taft-Hartley Act), and the law of the State of Missouri, and to force, influence, threaten, coerce, and intimidate plaintiff to influence and coerce the said salesmen to join the said defendant union, contrary to the express provisions of the Taft-Hartley Act and the law of the State of Missouri, and Section 29 of Article I of the Constitution of Missouri." It was also alleged by plaintiff and admitted by defendants that "plaintiff is engaged in Interstate Commerce and that both plaintiff and its employees are subject to the provisions of the Labor Management Relations Act of 1947 (Taft-Hartley Act)."

On October 22, 1953, the court made an order permitting the Missouri Pacific Railroad Company to file a petition as an intervening plaintiff. In that petition the railroad

company alleged that the defendants had established the picket line knowing that the employees of the intervening plaintiff would not pass such pickets and that establishment of said picket line would prevent the intervening plaintiff from complying with its duty to serve Swift & Company; that by the terms of certain designated laws of the State of Missouri and of the Interstate Commerce Act, intervening plaintiff was compelled to render efficient and indiscriminate service to plaintiff; that in an effort to comply with the law, the railroad used certain of its managerial officers in switching crews to serve said plant, but that the railroad could not continue to use such officers for that purpose for the reason that in the safe and efficient operation of the railroad its officers could not be taken from their important supervisory work to perform such switching services, and hence the railroad sought injunctive relief against such picketing.

Defendants in their answer admitted that they did not represent any of plaintiff's employees and did not claim the right to bargain for said employees. It was further alleged that if the allegations of plaintiff's petition as to the purpose of the picketing were true, such would constitute a violation of Section 7, as well as Section 8 (b) (1) (2) of the Labor Management Relations Act of 1947, and such acts would constitute unfair labor practices and that, under the provisions of said Act, the means are provided for the prevention and correction of said unfair labor practices and that the processes of the Act are exclusive for the prevention and correction of said unfair labor practices; that "the field has been occupied and pre-empted by Congress and that this court is therefore without jurisdiction to entertain plaintiff's petition."

It was further alleged that the picketing was done for the purpose of informing the public generally of the fact that plaintiff's salesmen were nonunion, and that the picketing was conducted in a peaceful, orderly, and law-

ful manner. It was also alleged that any order of the court denying defendants the right to picket under the circumstances existing would deprive defendants of their rights under certain designated sections of the Constitution of the United States and of the State of Missouri.

It is tacitly admitted that the picketing in this case was peaceful and orderly. It was admitted by the officials of the union that no steps had been taken to organize these city salesmen by talking with them, inviting them to meetings, or in any other way explaining the advantages they contended would result from union membership. After the temporary restraining order was entered there was considerable evidence to indicate that the officials of the union requested its 1,650 members who own or are employed in, markets in the St. Louis area not to purchase products from plaintiff's salesmen, and the evidence indicates that this campaign was rather successful.

In the early part of November 1953 Judge Flynn, of the St. Louis Circuit Court, heard evidence on the question of whether or not a temporary injunction should be granted and the cause was taken under advisement and the restraining order continued in effect. Thereafter, in January 1954, the plaintiff filed two charges with the Regional Director of the National Labor Relations Board, one alleging unfair labor practices against the union, by reason of the picketing, in violation of Sections 8 (b) (1) (A) and 8 (b) (2), 29 U. S. C. A., Section 158, and the second alleging secondary boycott activities in violation of Section 8 (b) (4) of said Act. The regional director investigated and considered the first charge and declined to take further action, stating, "It does not appear that further proceedings are warranted inasmuch as the charge alleges activities that do not fall within the scope of Sections 8 (b) (1) (A) and 8 (b) (2)." This ruling was appealed to the general counsel who sustained the ruling of the

regional director. The regional director, however, issued a complaint on the boycott charge and obtained the ruling of the board to the effect that such boycotting constituted an unfair labor practice and the union was ordered to cease and desist from such practices. This ruling was affirmed on appeal. Amalgamated Meat Cutters, Etc. v. National Labor Relations Board, 237 F. 2d 20. It may also be noted that the National Labor Relations Board filed an action in the U. S. District Court seeking to restrain Swift & Company from enforcing the temporary restraining order obtained in the instant case. That relief was denied by the District Court, National Labor Relations Board v. Swift & Company, 130 F. Supp. 214, and that ruling (as to the result) was affirmed on appeal. 233 F. 2d 226.

Judge Flynn retired before any decision was entered concerning the issuance of the temporary injunction in the instant case, and the cause was assigned to another division of the circuit court. The cause was tried in October 1956. It was stipulated that said trial would constitute a hearing upon both the temporary and permanent injunctions. It was further stipulated that the trial judge could consider all of the evidence taken at the prior hearing before Judge Flynn, and that either party could read in evidence testimony taken in certain proceedings in the U. S. District Court. At the conclusion of the trial the court, as heretofore stated, entered a decree enjoining the defendants from picketing in the vicinity of plaintiff's plant or in the vicinity of the railroad tracks used by the intervening plaintiff in transporting property to and from the plant.

The primary contention of defendants upon this appeal is that the trial court had no jurisdiction over the subject matter because picketing for the purpose alleged in the petition was a violation of the Labor Management Relations Act, and the National Labor Relations Board was the

exclusive primary tribunal to determine the controversy (see Graybar Electric Co. v. Automotive, P. & A. I. Emp. Union, 365 Mo. 755, 287 S. W. 2d 794, and cases cited therein). For their second point defendants contend that (assuming the trial court had jurisdiction), neither the petition nor the evidence was sufficient to support injunctive relief on the theory that there was a violation of Section 29, Article I, Constitution of Missouri 1945. Other assignments in the appellants' brief concern alleged deficiencies in the proof and trial errors, which, in the view we take of this appeal, need not be noticed further.

Although our appellate jurisdiction is not questioned, we must raise and determine that question. Metzger v. Metzger, Mo. Sup., 145 S. W. 380. We quote from defendants' jurisdictional statement wherein they state that they "pleaded in their answer that to deny picketing under the circumstances in this case would violate rights guaranteed by Sections 8, 9 and 29 of Article I, Constitution of Missouri 1945, and by the First and Fourteenth Amendments to the United States Constitution; further, that the trial court had no jurisdiction over the subject matter of the action because Congress had granted exclusive jurisdiction thereof to the National Labor Relations Board. Thus, jurisdiction of this appeal is conferred on this court * * *." However, as previously indicated, the only constitutional provision mentioned or cited in the "Points Relied Upon and Authorities" in defendants' brief is Section 29, Article I, Constitution of Missouri 1945, V. A. M. S. (hereinafter referred to as Section 29), which reads as follows: "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

In determining questions concerning our appellate jurisdiction we look to Section 3, Article V of our Constitution which provides, in part, as follows: "The supreme court

shall have exclusive appellate jurisdiction in all cases involving **the construction** of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, * * * and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs exceeds the sum of seventy-five hundred dollars." (Emphasis ours.) We have heretofore stated that, "In cases involving the appellate jurisdiction of this court, we have sedulously retained to ourselves the right to look within the shell of briefs, pleadings, and transcript to the kernel of the thing, to see if the jurisdictional question is of substance: for to give life to a jurisdictional question it must be real, nor colorable only." Jenkins v. Local Union No. 6313, Etc., Mo. Sup., 263 S. W. 2d 337, 339. Also, we have said that "in order to preserve a constitutional question for review the question must be raised at the first available opportunity; the sections of the constitution claimed to have been violated must be specified; the point must be presented in the motion for a new trial, if any; and it must be adequately covered in the briefs." Ingle v. City of Fulton, Mo. Sup., 260 S. W. 2d 666, 667. The rule is also settled that we will not assume jurisdiction of a case on the ground that a constitutional question is involved when the identical question sought to be invoked has been settled by prior decisions of the Supreme Court. City of Marshfield v. Brown, 337 Mo. 1136, 88 S. W. 2d 339; Metzger v. Metzger, supra.

Assuming (for the sole purpose of determining our appellate jurisdiction) that the circuit court had jurisdiction of the subject matter of this action, we think it may fairly be said that the real and fundamental issue tried in that court was whether or not the picketing was unlawful in that it was for the purpose of forcing plaintiff to coerce its salesmen into joining the union, and selecting as their bargaining representative, contrary to the provisions of

Section 29 and the Labor Management Relations Act, supra. In that connection it may be stated that we have repeatedly held that picketing for that purpose is violative of the free choice guaranteed to employees by Section 29. Quinn v. Buchanan, Mo. Sup., 298 S. W. 2d 413; American Hotel Co. v. Bartenders' International L. of A., Mo. Sup., 297 S. W. 2d 411; Bellerive Country Club v. McVey, 365 Mo. 477, 284 S. W. 2d 492; Tallman Co. v. Latal, 365 Mo. 552, 284 S. W. 2d 547. No additional construction of Section 29 is necessary in regard to that point and we do not understand that such is sought in defendants' brief.

It may also be noted that under Point II (D) of defendants' brief it is contended that the evidence would not support a finding that the picketing was for the purpose of forcing plaintiff to coerce its employees, but that, at most, it would only support a finding that the picketing was for the purpose of forcing plaintiff to merely encourage its employees to join the union, which was not a violation of Section 29. That contention does not require a construction of Section 29, as plaintiff makes no contention that it would be a violation of that section, for it to merely encourage its employees to join the union and, moreover, we have ruled in the cases heretofore cited that the use of lawful persuasion is not prevented by that constitutional provision.

However, under Point II (B), defendants point out that plaintiff's petition alleges that the purpose of the picketing was to force the employer to coerce the employees into joining defendants' union in violation of Section 29, and, in that connection, defendants contend that the petition does not state facts sufficient to constitute a claim against defendants because, "it is only coercion of employees in their choice of bargaining representative that is unlawful under that constitutional provision, and merely coercing

employees to join a particular union is not violative thereof." Even if we assume that this contention would ordinarily call for a construction of Section 29, we rule that such is not required under the facts and circumstances existing in the instant case in order to determine the issue as to whether the petition stated facts which were sufficient to constitute a claim against the defendants.

In the first place it should be noted that it was assumed by the defendants in their answer, and by all parties throughout the trial, that the petition alleged that the purpose of the picketing was to force plaintiff into coercing its employees into joining the union and choosing the union as their bargaining representative, or that the latter was encompassed within the allegation actually made. Note the following in defendants' answer: "These defendants state that the allegations of plaintiff's petition to the effect that the picketing has as one of its objectives the compelling of plaintiff to coerce its employees into becoming members of the union **or the coercing of plaintiff's employees in their right to be represented by representatives of their own choosing** alleges acts and conduct which, if true, constitute a violation of Section 7 as well as Section 8 (b) (1) and (2) of the Labor Management Relations Act of 1947." (Emphasis ours.) Moreover, in the opening statement made by counsel for defendants at the tim of the trial before Judge Mayfield, the following appears: "The pleadings themselves reveal that throughout this entire case both plaintiffs have contended in their pleadings that the object or purpose of the union undertaking was to exert sufficient economic pressure upon Swift & Company so as to force, by that economic pressure, Swift & Company to in turn coerce its employees, in the rights that the employees have, to stand and be represented by representatives of their own choosing. Counsel for Swift & Company repeated that position again this morning; the pleadings set it forth clearly and Your Honor will observe

in the transcript (of Order to Show Cause Hearing) the position is repeatedly taken, namely, the activities of the Union sought to force Swift to coerce its employees in their rights to be or not to be **represented** by a Union of their own choosing."

It may also be noted that there was considerable evidence admitted (without objection on the ground that it was beyond the pleadings) from which it could reasonably be found that defendants were seeking to persuade plaintiff's employees to join the union so that it could act as their bargaining representative, and there was no evidence to the contrary.

Since defendants did not attack the petition in the trial court, and since the case was tried on the theory that coercion of the employees in their choice of the union as a bargaining representative was an issue, if (which we do not decide) such an allegation is necessary in order that the petition may state a claim, it will be treated as amended in that respect. Section 509.500, R. S. Mo. 1949, V. A. M. S.; Woolfolk v. Jack Kennedy Chevrolet Co., Mo. App., 296 S. W. 2d 511.

Since it appears that it is not essential to a decision of the question concerning the sufficiency of the petition that we determine the only point raised by defendants which might require a construction of the constitution of this state, we rule, as heretofore indicated, that we do not have appellate jurisdiction on that ground. Rollins v. Business Men's Acc. Ass'n, Mo. Sup., 213 S. W. 52; Home Owners' Loan Corporation v. Caplan, 349 Mo. 853, 160 S. W. 2d 754.

It is intimated in defendants' jurisdictional statement that we have appellate jurisdiction because the appeal involves questions concerning the application of the Labor Management Relations Act, 1947, 29 U. S. C. A., Sections 141 et seq., and the alleged exclusive jurisdiction of the

subject matter by the National Labor Relations Board. In order to vest this court with appellate jurisdiction because of the existence of a so-called "federal question" it is required that the appeal involve the **validity** of a statute of the United States or the **validity** of authority exercised under the laws of the United States. We think it apparent that no such question is here involved. "The necessity for an interpretation and application of the terms of a federal statute does not bring the case within the state constitutional provision conferring appellate jurisdiction on this court on the theory that the validity of authority exercised under the laws of the United States is in question." Kansas City Terminal Ry. Co. v. Manion, Mo. Sup., 290 S. W. 2d 63, 70.

We have also considered the question as to whether we have appellate jurisdiction because of the amount in dispute. No damages were sought by plaintiff so there was no amount in dispute in that respect. However, it has been said that "When the object of an action is not to obtain a money judgment, but other relief, the 'amount in dispute,' in an appellate jurisdictional sense, must be determined by the value in money of the relief to plaintiff, or the loss to defendant, should the relief be granted, or, ice versa, should the relief be denied." Ingle v. City of Fulton, supra, 260 S. W. 2d 666, 668. It does not appear from the evidence that there was any monetary loss to defendants by reason of the entry of the decree. There is evidence from which it may reasonably be said that plaintiff would suffer a large amount of damages in the event of prolonged picketing. However, if the relief sought by plaintiff had been denied, we cannot say with certainty that the resulting damages would have exceeded $7,500, as it is purely speculative to attempt to predict how long the picketing would have continued. It might have been terminated in an hour, or it might have continued for a day or a month or a year. We therefore conclude that it does

not affirmatively appear that an amount in excess of $7,500 was in dispute.

This court being without appellate jurisdiction, the cause is transferred to the St. Louis Court of Appeals.

Lawrence Holman,
Commissioner.

Van Osdol, C., Concurs.

Coil, C., Concurs.

Per Curiam. The foregoing opinion by Holman, C., is adopted as the opinion of the court.

All concur.

APPENDIX "F".

National Labor Relations Act, as amended,
Title 29 United States Code, Sect. 151 et seq.:

Section 3 (b):

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence of subsection (a) of this section. The Board shall have an official seal which shall be judicially noticed."

Section 3 (d):

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to

bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

Section 8 (a) (1):

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

Section 8 (a) (3):

"(a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when

made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (c) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 8 (b) (1) (A):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

Section 8 (b) (2):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of sub-

section (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 10 (a):

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

United States Constitution:

Fifth Amendment:

"Amendment V—Capital Crimes; Due Process.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Tenth Amendment:

"Amendment X—Reserved Powers to States.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment:

"Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."